# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 745.

MILO HOADLEY, APPELLANT,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

**FILED OCTOBER 5, 1876.**

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1 *Amended bill in equity.*

In the circuit court of the United States for the district of California.

To the judges of the circuit court of the United States for the district of California.

Milo Hoadley, a citizen and resident of the State and district of California, brings this his amended bill against The City and County of San Francisco, a municipal corporation of the said State, and thereupon your orator complains and says:

This suit was commenced January 5, 1870, in the district court of the 12th judicial district of the State of California, in and for the city and county of San Francisco, whence it was removed to this court by said complainant under the act of Congress approved March 3, 1875, entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes."

2 1. That your orator is the owner in fee-simple absolute, and in possession, of the following-described parcels of land situated in the city and county of San Francisco, State of California, namely:

First. Commencing at the point of intersection of the north line of Clay street with the east line of Scott street, running thence northwardly along the last-named line 275 feet, more or less, to the north line or boundary of the "Hoadley claim;" thence in a line due east along the north line of the "Hoadley claim" to its intersection with the western line of Pierce street; thence southwardly along the western line of Pierce street, 275 feet, more or less, to the north line of Clay street; thence westwardly along the last-named line 412½ feet to the place of beginning.

Second. Commencing at the point of intersection of the southern line of Post street with the eastern line of Scott street, running thence southwardly along the last-named line 275 feet to the northern line of

3 Geary street; thence eastwardly along the last-named line 412½ feet to the western line of Pierce street; thence northwardly along the last-named line 275 feet to the southern line of Post street; thence westwardly along the last-named line 412½ feet to the place of beginning.

2. The possession of said parcels of land is and has been in this complainant from the year 1850 down to the time of the commencement of this suit.

3. That said parcels of land are situated west of Larkin street, within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the legislature of the State of California on the 15th day of April, one thousand eight hundred and fifty-one, hereinafter referred to.

4. That on and before the first day of January, A. D. 1855, your orator was, and ever since has been, down to the time of the commencement of this suit, in the actual possession of the above-described

4 premises, occupying and claiming the same in his own right as the owner thereof adversely to the claim of the late city of San Francisco, and to the defendant herein, the successor to said city, and to all others.

5. That at and prior to the acquisition of the Territory of California by the United States from Mexico, in the year 1848, by the treaty of Guadalupe Hidalgo, there was existing at the place afterwards called the city

of San Francisco a town or pueblo claiming title in her corporate capacity to four square leagues of land, including the land herein described, which town or pueblo continued till after the organization of the State of California, and until the incorporation of the city of San Francisco, as hereinafter stated.

6. That afterwards the legislature of California passed an act entitled "An act to incorporate the city of San Francisco," approved April 15th, 1850, whereby the inhabitants of the city of San Francisco, including those within the former pueblo limits, were constituted a body politic and corporate, in fact and in law, by the name and style of the "City of San Francisco," and the legislative power of said city was by said act vested in a mayor, and a common council consisting of a board of aldermen and a board of assistant aldermen.

7. That afterwards the legislature of the State of California passed another act, approved April 15, 1851, entitled "An act to re-incorporate the city of San Francisco," whereby the act last before named was repealed, and the people of the city of San Francisco, within certain limits hereinafter specified, including those within said pueblo limits and within said first incorporation, were continued and organized as a body politic and corporate, under the name and style of "The City of San Francisco," with power of perpetual succession, and with power expressly given by said charter to purchase, receive, and hold property, real and personal, and to sell or otherwise dispose of the same for their common benefit.

8. That by the said act of re-incorporation, the legislative power of said city was vested in a mayor, and board of aldermen, and a board of assistant aldermen, composing the common council of said city.

9. That afterwards the legislature of the State of California passed an act entitled "An act to re-incorporate the city of San Francisco," approved May 5, 1855, which went into effect on the first Monday of July, 1855.

10. That by the act last named the corporation known as the city of San Francisco, organized under said act of 1851, was continued as a body politic and corporate, in *the* name and in fact, by the name and style of "The City of San Francisco," with the right of perpetual succession by that name, and with the right and power to purchase, receive, hold, and enjoy real and personal property, and to sell and convey, mortgage, and dispose of the same for the common benefit. That said act of incorporation gave said common council power, also, to "confirm, dispose of, and make all needful rules and regulations respecting the title to lands or other property of the city."

11. That in and by said act of incorporation the legislative power of said city was vested in a mayor and a board of aldermen and a board of assistant aldermen, composing the common council of said city.

12. That afterwards the legislature of the State of California passed an act entitled "An act to repeal the several charters of the city of San Francisco, to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof," approved April 19, 1856.

13. That by the act last named the former charters were repealed, and the said city of San Francisco was continued a body politic and corporate, in name and in fact, by the name of the city and county of San Francisco, with perpetual succession; and all the rights and property of said city of San Francisco were by said act vested in said city and county of San Francisco, (the defendant herein,) organized and incorporated by the act last named; and said city and county

was made the legal successor to the rights, duties, and liabilities of said city of San Francisco.

14. That the act last named is commonly known and called "the consolidation act;" that the legislative power of said corporation under said consolidation act was vested in a board of supervisors and a president of the board of supervisors.

15. That said consolidation act took effect July 1, 1856, and the same still continues in full force and operation.

16. That by subsequent legislation the name and title of the presiding officer of said board of supervisors, and chief executive officer
9 of said city and county of San Francisco, was changed from that of "president of the board of supervisors" to that of mayor.

17. That the parcels of land herein mentioned as the subject of this suit are situated within the limits of the former pueblo, and within the corporate limits defined in each and all of the acts of incorporation herein mentioned, and they are a part of the four square leagues of land claimed by said pueblo, and afterwards claimed and petitioned for by and confirmed to said city, as hereinafter stated.

18. That on the 2d day of July, 1852, the city of San Francisco, then organized as a corporation under said act of May 15, 1851, presented her claim as successor to said pueblo, and petition for confirmation to four square leagues of land, including the land herein mentioned, to the board of commissioners organized and acting under the act of Congress entitled "An act to ascertain and settle private land-claims in the State of California," approved March 3, 1851, which claim was confirmed
10 by said commissioners; and afterwards, on the 18th of May, 1865, said claim was finally confirmed by the decree of the circuit court of the United States for the district of California, to which court said claim and petition had been transferred by law.

19. That said final decree of confirmation was for four square leagues of land, by description, including the premises in controversy, and the said decree, in terms, declared that "this confirmation is in trust for the benefit of the lot-holders under grants from the pueblo, town, or city of San Francisco, or other competent authority."

20. That the common council of said city of San Francisco passed an ordinance, number 822, entitled "An ordinance for the settlement and quieting of the land-titles in the city of San Francisco," which was approved by the mayor of said city of San Francisco June 20, 1855, wherein, by the first and second sections thereof, it is ordained as follows:

11 "SEC. 1. It shall be the duty of the mayor to enter, at the proper land-office of the United States, at the minimum price, all the lands above the natural high water mark of the bay of San Francisco at the time of the admission of California into the Union as a State, situated within the corporate limits of the city of San Francisco as defined in the act to incorporate said city, passed April 15, 1851, in trust for the several use, benefit, and behoof of the occupants or possessors thereof, according to their respective interests.

"SEC. 2. The city of San Francisco hereby relinquishes and grants all the right and claim of the city to the lands within the corporate limits to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, A. D. 1855, and to their heirs and assigns forever, (with certain exceptions therein specified.")

21. The premises first hereinabove described are a part of the
12 land so relinquished and granted to the possessors, and not within any of the exceptions in said ordinance.

22. That said ordinance 822 contained the following further provisions, viz:

"SEC. 3. The patent issued or any grant made by the United States to the city shall inure to the several use, benefit, and behoof of the said possessors, their heirs and assigns, mentioned in the preceding section, (meaning said sec. 2,) as fully and effectually, to all intents and purposes, as if it were issued or made directly to them individually and by name."

And said ordinance further provided that the city should have the right to lay out and open streets through the granted premises, whenever the city deemed it expedient, without expense to the city, at the entire expense of the adjacent property; and, further, that said city might lay out and reserve upon the said lands public squares, which shall not embrace more than one block corresponding in size to
13 the adjoining blocks, and that the selections shall be made within six months from the passage of this ordinance; and that the city shall not, without due compensation, occupy for all municipal and public purposes, after laying out the streets, more than one-twentieth part of the land in the possession of any one person. Said selections were, by the terms of said ordinance 822, to be made by a commission, to consist of three persons, to be chosen by the common council, "who shall report the same to the common council for its approval, and upon such approval deeds of release to the corporation for the lands thus selected shall be executed, acknowledged, and recorded, in which deeds shall be specified the uses for which they are granted, reserved, and set apart respectively;" and also the further provision that nothing contained in this ordinance shall be construed to prevent the city from continuing to prosecute
14 to a final determination her claim now pending before the United States land-commission for pueblo lands, for the several use, benefit, and behoof of the said possessors mentioned in section 2, as to the lands by them so possessed, and for the proper use, benefit, and behoof of the corporation as to all other lands not hereinbefore released and confirmed to the said possessors.

Your orator never made, executed, or acknowledged any deed or release or conveyance to the corporation for any of the lands selected by said commission, nor for any of the lands herein referred to; nor was any deed of release ever asked or demanded of your orator by said corporations or either of them, nor was any compensation ever paid, tendered, or offered to him for any of said land, nor for any excess so selected by said commission over the one-twentieth of said land in his possession.

23. That at the time said ordinance 822 was passed and approved, as aforesaid, the common council of said city was organized and
15 acting under and by authority of said charter of 1851, that is to say, the said act of the legislature of the State of California entitled "An act to re-incorporate the city of San Francisco," approved April 15, 1851.

24. That under and by the terms of the act last named, the said common council had full power and authority to pass said ordinance 822, and the mayor had full power and authority to approve the same; and the said ordinance, when so passed and approved as aforesaid, became and was a legal and valid ordinance, and vested all the title of said city to said land in your orator, who was the actual possessor thereof all the time from January 1, 1855, up to the time of the introduction of said ordinance in the said common council, and down to the commencement of this suit.

25. No selections were made of any lots or squares by said
16 commission nor by said city for public uses within six months from the passage of said ordinance 822.

26. That afterwards the common council of said city of San Francisco passed another ordinance, number 845, entitled "Ordinance providing for selecting and designating public squares and reservations for hospitals, fire-engines, and school purposes, and for adopting the plan of streets in the western and southwestern portions of the city, according to the provisions of ordinance 822," which was approved by the mayor of said city September 27, 1855, wherein and whereby the said city, through its common council, did ordain and enact as follows: That "the board of aldermen and the board of assistant aldermen shall meet in joint convention at their next regular meeting after the passage of this ordinance, and proceed to elect three commissioners, who shall have the powers and proceed to discharge the duties specified in section 8
17 of said ordinance number 822."

"SEC. 2. It shall be the duty of the city surveyor, acting in conjunction with the said commissioners, and with their concurrence, to furnish, by way of recommendation to the common council, within one month from the date of their appointment, a plan for the location and dimensions of the streets to be laid out within the city limits west of Larkin and southwest of Johnston streets, upon which plan shall also be designated the lots and grounds selected by the said commissioners for the use of the city under the provisions of the aforesaid ordinance number 822.

"SEC. 3. The said ordinance, number 822, referred to in the preceding section 1, is hereby re-ordained, ratified, and confirmed in all its parts."

27. That afterwards, to wit, Nov. 12, 1855, said board of aldermen and board of assistant aldermen met in joint convention and selected
18 three commissioners, as prescribed in said ordinances 822 and 845. The common council never passed any ordinance to determine how many lots were necessary for sites for school-houses, hospitals, fire-engine house, or any other public establishments, as provided for in section six of said ordinance No. 822.

28. That afterwards the city surveyor, acting in conjunction with said commissioners so selected, and with their concurrence, did make and furnish, by way of recommendation to the common council, the map or plan of the city hereinafter mentioned, but said map or plan was not made or presented to the common council for its approval until April 19, 1856.

29. That in making said map said commissioners violated their instructions, powers, and duties, as defined in said ordinances 822 and 845, in this, among other things, that upon said map they laid out six squares or plazas, each containing four blocks, in size correspond-
19 ing with the adjoining blocks, instead of a single block, as provided in section 6 of ordinance 822, one of which squares of four blocks the said commissioners designated on said map as "Alta Plaza," including the parcel of plaintiff's land first above described; and another of said squares, containing four blocks, said commissioners designated on said map as "Hamilton Square," including the parcel of plaintiff's land secondly above described.

30. That said commissioners reported said map, with their said selections thereon designated, (so made by them in disregard of their power and instructions,) to the common council, their constituents, for approval, April 19, 1856, and not before; and said common council never did approve said map, but refused to approve the same.

31. That no selections of land for public or municipal purposes was made by said city, or by said commission, from the lands men-
20 tioned in said ordinance 822 within six months after the passage of said ordnance 822; nor did said commissioners make or report said map, or any map or plan or selection, to the common council for its approval for more than six months after their appointment, and not until the 19th day of April, 1856.

32. That the land of your orator so included in said squares was more than one-twentieth and more than a tenth of the whole of the land in his possession mentioned in said ordinance 822, after laying out the streets through the same by the city, and now existing; and no compensation has been made, offered, or tendered to your orator for said excess over one-twentieth.

33. That said common council which passed said ordinance 845 was organized and acting under the charter of 1855, so called; that is to say, under said act of the legislature of the State of California
21 entitled "An act to re-incorporate the city of San Francisco," approved May 5, 1855, which act went into effect on the first Monday in July, 1855.

34. That under and by virtue of the act last named, said common council had full power and authority to pass said ordinance 845, and the mayor had full power and authority to approve the same; and the said ordinance, when so passed and approved as aforesaid, became effective, and was a legal and valid ordinance, and confirmed the said ordinance 822, and gave all the title of said city in said parcels of land to your orator.

35. That on the 16th day of October, 1856, the board of supervisors of the city and county of San Francisco (organized and acting under said consolidation act of 1856) passed an order, of which the following is a copy:

"That the plan or map of the western addition, reported by the
22 commission created under an ordinance of the last common council of the city of San Francisco, be adopted by this board, and be declared to be the plan of the city in respect to the location and establishment of streets and avenues and the reservation of squares and lots for public purposes in that portion of the then incorporated limits of said city lying west of Larkin and southwest of Johnston street."

That the map or plan referred to in said order is the same map made by said commission, and reported to the common council, as above stated, April 19, 1856.

36. That afterwards, to wit, March 11, 1858, the legislature of the State of California passed an act, entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," which act was approved at the date last named.

23 37. That in and by said act the above-mentioned ordinances 822 and 845 of said common council, and also the said order of said board of supervisors, last above recited, are set out and recited at length; and afterwards said act contains the following enactment ratifying and confirming the same, in words following:

"Be it therefore enacted, That the within and before recited order and ordinances be, and the same are hereby, ratified and confirmed, and all the land entered or to be entered in the United States land-office, in pursuance of section one of the first-recited of said ordinances, in trust, shall pass and inure to, and be deemed to have immediately vested in, the occupants thereof, for their several use and benefit, according to

their respective interests, in execution of the trust designated in an act of Congress entitled 'An act for the relief of citizens of towns
24 upon the public lands of the United States, under certain circumstances,' approved May 23d, one thousand eight hundred and forty-four, as extended and applied by an act of Congress entitled 'An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes,' approved March 3d, one thousand eight hundred and fifty-three; and it shall be the duty of all courts and officers to take judicial notice of the said order and ordinances as hereinbefore recited, without further proof, as fully and effectually, to all intents and purposes, as if they were public acts of the State legislature.

"SEC. 2. That the grant or relinquishment of title made by the said city in favor of the several possessors, by sections two and three of the ordinance first above recited, (meaning said ordinance 822,) shall take effect as fully and completely, for the purpose of transferring the
25 city's interest and for all other purposes whatsoever, as if deeds of release and quit-claim had been duly executed and delivered to and in favor of them individually and by name; and no further conveyance or other act shall be necessary to invest the said possessors with all the interest, title, rights, benefits, and advantages which the said order and ordinances intend or purport to transfer or convey, according to the true intent and meaning thereof.'

38. The said ordinances 822 and 845, and the said order of said board of supervisors herein above referred to, are the same as those set forth and recited in the above-mentioned act of the legislature of the State of California, and as printed and published in the public acts of the legislature of said State, (at page 52 and following, for the year 1858,) and the said ordinances and order are now hereby referred to for greater certainty, and made a part of this amended bill.

26 39. That afterwards the Congress of the United States, pending the city's said petition for confirmation, passed an act, approved July 1, 1864, entitled "An act to expedite the settlement of titles to lands in the State of California," wherein, and by the fifth section thereof, it was enacted "That all the right and title of the United States to the lands within the limits of the city of San Francisco, as defined in the act incorporating said city, passed by the legislature of the State of California on the 15th of April, one thousand eight hundred and fifty-one, are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinances of said city, ratified by an act of the legislature of said State approved on the 11th of March, 1858, entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of the city," with certain exceptions therein mentioned.

27 40. The premises herein described, the subject of this suit, are within and a part of the land relinquished and granted by said act of Congress, as therein mentioned, and not within or any part of any of the exceptions mentioned in said act of Congress.

41. That by virtue of the grant to the said city and its successors in said act of Congress, and of the grant and confirmation by said city to the possessors in said ordinances, and of the possession of said land by your orator, as aforesaid, and of said decree of confirmation by said circuit court, your orator has become, and now is, the owner in fee-simple absolute of the parcels of land above described.

42. That said order passed by the board of supervisors of said city and county October 16, 1856, above mentioned, originally, when passed,

or when confirmed by the legislature, as aforesaid, had no other purpose or effect than to adopt a then existing plan or map of said
28 city, that is to say, the said map made and reported by said commission, and did not (as the defendant falsely pretends) relate to or effect the title to any land thereon delineated, nor does it in any manner impair, modify, or repeal said ordinances, or either of them, nor the grants thereby made, or divest your orator's title to the above-described premises granted by said ordinances, but left the said ordinances, and the grants therein, in full force and operation in all their parts.

43. That the defendant herein, contriving to annoy and injure your orator, and to cast a cloud upon his title to said land, falsely and unjustly pretends that your orator is not the owner, nor entitled to the possession of, said premises; but that defendant is the owner, and that the defendant has the right to the possession thereof for the purpose of public parks or squares.

44. That by the means herein mentioned, and not otherwise,
29 plaintiff's lands, herein described, falsely and improperly appear on said map as within and a portion of said squares, falsely called public squares, but none of said land was ever in fact in the use, occupation, or possession of defendant, nor of the public, but, on the contrary, the same has been in the continuous and exclusive use and occupation of plaintiff, claiming the same in his own right, from the year 1850 down to the time of the commencement of this suit.

45. That upon the facts above stated, and with no other right or title thereto, defendant falsely claims and pretends that said land is not the property of plaintiff; that said act of Congress of 1864 gave plaintiff no title thereto; but that the same is in and a part of the public parks of said city, and dedicated to public use, and that plaintiff is an intruder thereon; whereby purchasers of real estate are misled, and falsely
30 made to believe that your orator has no title to said land, but that the same is a part of the said squares falsely by defendant called public squares, and that your orator is but an intruder thereon.

46. That by reason of the grant of the lands in said ordinances and in said act of Congress being to the possessors as a class, without naming them, the title of your orator to said premises, though in fact good, depends upon various acts in pais to establish his possession and title to said land, of which acts of possession there is no record; by reason whereof the aforesaid false and groundless pretensions of defendant in claiming said land, and in allowing it to stand on said map, appearing as a part of said so-called public squares, cast a cloud and distrust upon your orator's title thereto, so that it has become unmarketable, and your orator cannot sell or dispose of the same in any
31 manner for one-half its real value; all of which actions, doings, and pretensions are contrary to equity and good conscience, and tend to manifest wrong and injury to your orator in the premises.

47. That said land above described, the subject of this suit, is of the value of twenty thousand dollars and upwards.

48. Your orator further avers that the defendant has not had, nor has any predecessor in interest of defendant held or had, the possession of the property in dispute herein at any time within five years, nor within ten years prior to the commencement of this suit; but, on the contrary, your orator for more than nineteen years immediately prior to the commencement of this suit has been in the actual, bona fide, uninterrupted, and continuous possession of said property hereinbefore described, claiming the same adversely to the defendant, and against the predecessors in interest of defendant, and against the whole world,

and that the defendant should not be permitted to set up any claim in or to said property, because any and all claim which the defendant may have, or pretend to have, in or to said property, is barred by the statute of limitations of the State of California, and by section 319 of the code of civil procedure of the State of California. The defendant made no demand nor commenced any suit against your orator for said land, though he held and possessed the same adversely to defendant and said city, the predecessor of defendant, for more than fourteen years after the passage of said ordinance 822, and for more than five years after said act of Congress prior to the commencement of this suit, with full knowledge on the part of defendant and said city of your orator's possession and adverse claim to said land, whereby defendant abandoned all right to said land, and should be estopped in equity from now setting up any right or title thereto, or to the possession thereof.

49. And forasmuch as your orator can only have adequate or proper relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable, your orator prays a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the City and County of San Francisco, corporation defendant, to be served on said mayor of defendant, commanding said defendant, on a day certain, therein to be named, and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to, perform, and abide such further order, direction, and decree as may be made against the corporation defendant; and that it may be herein ordered, adjudged, and decreed that your orator is the true and lawful owner of all and singular the above-described parcels of land, and every part thereof; and that the defendant has no right, title, or interest therein; and that the said lands are no part of any public square, park, or plaza, and that the defendant has no right, power, or authority to claim or designate them as such, and that they never were dedicated to public use; and that the defendant be forever enjoined and restrained from asserting any right or title therein or thereto, as against your orator, either for the purpose of a public square or otherwise; and for such other or further order, decree, or relief in the premises as may be just.

San Francisco, Cal., January 10, 1876.

S. W. HOLLADAY,
*Solicitor for Complainant, and of Counsel.*

Due service of a copy of this amended bill is hereby acknowledged for and on behalf of the defendant therein, and consent that the same may be filed in the cause as within due time.

San Francisco, January 12, 1876.

W. C. BURNETT,
*Deft.'s Atty.*

(Endorsed:) Filed 12 January, 1876. L. S. B. Sawyer, clerk. Amended bill in equity.

36 *Demurrer.*

In the circuit court of the United States, ninth circuit, district of California.

MILO HOADLEY, COMPLAINANT,
*vs.*
THE CITY AND COUNTY OF SAN FRANCISCO, defendant.
No. 1443. January 17, 1876.

Now comes the defendant in the above-entitled cause, and states and shows to the court here the following causes of demurrer to the amended bill in equity, which was filed herein on the twelfth day of January, A. D. 1876, to wit:

That said amended bill in equity does not state facts sufficient to constitute a cause of action, although such facts be taken to be true.

2nd. That said court has no jurisdiction herein.

That by reason thereof the complainant ought not to have or maintain his cause herein, or be granted any relief whatever.

37 Wherefore defendant asks that the relief asked for by said complainant be denied, and that she have judgment against him for costs.

W. C. BURNETT,
*Solicitor, and of Counsel for Defendant.*

I, W. C. Burnett, of counsel for said defendant, do hereby certify that, in my opinion, the foregoing demurrer is well.founded in point of law.

Dated San Francisco, Cal., January 17th, 1876.

W. C. BURNETT,
*Of Counsel for Defendant aforesaid.*

I admit due notice of the within at San Francisco this 17th day of January, A. D. 1876.

HOLLADAY,
*Attorney for Complainant.*

(Endorsed:) Filed January 17, 1876. L. S. B. Sawyer, clk. By J. F. O'Beirne, dep. clk.

38 *Order remanding cause to State court.*

At a stated term of the circuit court of the United States of America for the district of California, held at the court-room in the city of San Francisco on Monday, the fourth day of September, in the year of our Lord one thousand eight hundred and seventy-six.

Present: the honorable Stephen J. Field, associate justice of the U S. Supreme Court; the honorable Lorenzo Sawyer, circuit judge.

MILO HOADLEY
*vs.*
THE CITY & COUNTY OF SAN FRANCISCO.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it appearing to the satisfaction of this court that this cause was removed to this court from

the district court of the 12th judicial district of the State of Cali-
39 fornia, in and for the city and county of San Francisco, under and in pursuance of the act of Congress entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3d, 1875; and it appearing on the face of the bill that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, it is therefore ordered, adjudged, and decreed that the demurrer to the bill be sustained on that ground, and that this suit be, and the same is hereby, remanded to the said 12th district court, from which it was removed, at the costs of the plaintiff.

40 UNITED STATES OF AMERICA,
*District of California, ss:*

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing thirty-nine written pages (from 1 to 39 inclusive) are a full, true, and correct transcript of the amended bill in equity, the demurrer, and the order remanding the cause to the State court in the cause therein entitled.

Witness my hand and the seal of said circuit court this 27th day of September, A. D. 1876.

[SEAL.]

L. S. B. SAWYER,
*Clerk U. S. Circuit Court, 9th Cir., Dist. Cal.*

41 Circuit court of the United States, district of California.

MILO HOADLEY, APPELLANT,
*vs.*
THE CITY AND COUNTY OF SAN FRANCISCO, respondent. } No. 1443.

It is hereby stipulated that the foregoing copies of the amended bill of complaint, the demurrer filed thereto, the decree sustaining said demurrer and remanding said cause to the State court are true copies of the respective originals, and that the same are all the papers necessary to compose the record, and that they shall constitute the transcript on this appeal to the Supreme Court of the United States; that an order granting plaintiff's appeal was duly entered of record September 26th, 1876, in said cause, and that thereafter, on the same day, the ap-
42 pellant filed therein a good and sufficient bond on appeal in the sum of $500, approved by the judge of said circuit court.

San Francisco, September 27th, 1876.

W. C. BURNETT,
*Attorney for Respondent.*
S. W. HOLLADAY,
*Attorney for Appellant.*

(Indorsed:) Circuit court of the United States, district of California. Milo Hoadley, appellant, vs. The City and County of San Francisco, respondent. Stipulation as to correctness of transcript.

(Indorsement on cover:) No. 745. Milo Hoadley, appellant, vs. The City and County of San Francisco. California C. C. U. S. Filed 5th October, 1876.

No. _____ October Term, 1876.

# In the Supreme Court

—OF THE—

# UNITED STATES.

MILO HOADLEY,
*Appellant,*

vs.

THE CITY AND COUNTY OF SAN FRANCISCO,
*Respondent.*

## Brief for Appellant,

## ON THE QUESTION OF JURISDICTION.

S. W. HOLLADAY,
Attorney for Appellant.

*Filed* .....

..... *Clerk.*

SAN FRANCISCO:
Bonnard & Daly, Brief and Transcript Printers, 609 Merchant street.
1876.

# IN THE SUPREME COURT

OF THE

# UNITED STATES.

MILO HOADLEY,
*Appellant,*
*vs.*
THE CITY AND COUNTY OF SAN FRANCISCO,
*Respondent.*

## BRIEF FOR APPELLANT.

The single question presented on this appeal is that of the jurisdiction of the Circuit Court.

The cause was removed from one of the State Courts of California to the Circuit Court for the District of California, under and pursuant to the Act of Congress of March 3, 1875, "To determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from State Courts, and for other purposes." (See Desty's Federal Procedure, page 71.)

After the cause had been regularly removed to and docked in the Circuit Court, plaintiff, by leave,

filed this amended bill herein, which appears in the record now to be considered.

The City and County of San Francisco, defendant, a municipal corporation of the State of California, by her counsel, appeared and interposed her demurrer to the amended bill, specifying two grounds of demurrer.

1st. That the alleged facts are insufficient to entitle plaintiff to any relief; and,

2d. That the Court has no jurisdiction in the case.

After argument, the Circuit Court sustained the demurrer on the second ground stated, and held, in the language of the 5th Section of the Act above mentioned, "that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court;" and remanded the cause to the State Court whence it came.

From that order denying jurisdiction and remanding the cause, this appeal is prosecuted, the Circuit Court having granted an appeal.

Such order of the Circuit denying jurisdiction and remanding said cause to the State Court, is reviewable by the Supreme Court on appeal.

See the latter part of Sec. 5 of the Act, Desty, p. 74.

**It is the purpose of this Brief to show that the case was properly cognizable in the Circuit Court, and that the order denying jurisdiction and remanding the cause to the State Court, was erroneous.**

In order to present that question intelligibly, it becomes necessary to refer to the facts stated in the amended bill, including the public Laws, Statutes and Ordinances relating to the subject, therein set forth, all of which, for this purpose, are to be taken as true.

The suit is brought to quiet plaintiff's title to the land in dispute, as against the claims of defendant, which are a cloud upon it.

Plaintiff's possession of the land is alleged, with a claim of title thereto for twenty-six years last past.

Conceding the jurisdiction, then, confessedly, the bill makes out a good cause of action in equity upon which the Federal Court may take cognizance to remove the cloud upon his title, *if plaintiff's construction* of the Congressional legislation upon the subject be maintained; or else to authorize the Court upon the facts stated, to pronounce plaintiff's claim of title to be false and groundless, *if the defendant's construction of the same legislation* be maintained by the Court.

The single question, therefore, now involved is, whether or not the Federal Court has cognizance of the case; or do the facts stated show that the question of title presented in this record is one of *exclusive* State cognizance.

**For the plaintiff, we maintain that the Circuit Court has jurisdiction—that it was expressly conferred by the Act of Congress passed March 3d, 1875.**

See Statutes of 1875, page 470; also found at page 71 of Desty's Federal Procedure.

The first Section of that Act confers original jurisdiction concurrent with the State Courts, in all suits of a civil nature at common law or in equity (above $500), "arising under the * * * laws of the United States," &c.

Section 2 of the same Act authorizes the removal of such suits from the State Courts to the Circuit Courts.

This suit was so removed.

The intention is unmistakable to confer jurisdiction in cases where an alleged right belongs to a party, or it does not, depending upon the *meaning or construction* to be given to a Law of Congress.

It is the unquestionable right of the tribunals of every independent State, to give a judicial construction to its own laws.

The Courts of the United States are no exception to this rule.

This plaintiff asserts title to the land in suit under the express grant contained in the Act of Congress of July 1, 1864. (See *infra.*)

Defendant says no; that Statute gave the land to me, to be administered for certain public purposes. You, Mr. plaintiff, do not understand it rightly.

Thereupon, the parties apply to the grantor, the United States, their munificent Uncle Sam, and ask him to speak through his Courts and say what he meant by the grant.

The grantor is supposed to know what he meant; and his Courts are competent in cases of doubt to explain his meaning.

There is no dispute, that the land in suit is within and a part of the tract referred to in the 5th Section of the Congressional Act of July 1st, 1864, entitled "An Act to Expedite the settlement of Titles to Lands in the State of California," as follows:

Sec. 5. And be it further enacted, that *all the right and title of* the United States *to the lands* within the corporate limits of the City of San Francisco, as defined in the Act incorporating said city, passed by the Legislature * * April 15th, 1851, are *hereby relinquished and granted* to the said city and its successors for the *uses and purposes specified* in the *Ordinances* of said city, ratified by an Act of the Legislature of said State, approved March 11th, 1858, * * (giving the title of the Act.)

See Vol. 13 U. S., Statutes at Large, page 332.

It is the established law of the Land that the paramount title to the land in suit, was in the United States up to the passage of said Act of July 1st, 1864.

Townsend *vs.* Greely, 5 Wallace, 337.

Grisar *vs.* McDowell, 6 Wallace, 371, 373.

Montgomery *vs.* Bemis, U. S. Cir. Ct. for Cal., Aug., 1871.

San Francisco *vs.* Canovan, 42 Cal, 455, and numerous other cases in the Federal Courts and in the State Courts of California to the same effect; and none to the contrary.

The United States, the paramount owner, disposed of the title to the land by the Act above recited, by words of present grant, to the City of San Francisco, the defendant, for the uses and purposes specified in certain Ordinances mentioned in the grant, which Ordinances the city had theretofore passed, assuming to dispose of the property as the proprietor.

The Ordinances referred to, which *specify* the uses and purposes of the grant, are found in the Act of the Legislature, at page 52 of the Statutes of California for the year 1858.

Those Ordinances are as much a part of the Congressional Statute of 1864 as if they had been set forth therein at length.

Adams *vs.* Hill, 4 Shipley, 215.

Buckley *vs.* Blackwell, 10 Ohio, 510.

Hicks *vs.* Coleman, 25 Cal., 128.

Caldwell *vs.* Carter, 30 Cal., 541.

Vance *vs.* Fore, 24 Cal., 444, and cases there cited.

This plaintiff, by his bill, asserts title to this land by virtue of the grant in said Act of Con-

gress to himself *as a possessor of the land* according to the terms of the Ordinances.

The grant in the Act of Congress was completely executed in advance, through the Ordinances, operating upon plaintiff's possession of the land ever since the year 1850.

Such is plaintiff's claim to the land, based upon said grant.

The bill goes further and shows the ground of defendant's adverse claim to be *a different construction of the same grant*, such as would devote the land to public use—such as would give the possession of it to defendant.

This makes a "suit arising under the * * * "laws of the United States," and clearly within the meaning of said Act of March 3, 1875, to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes, &c.

In all respects this suit is one of the kind which the Act authorizes to be removed, *if it arises under a law of the United States.*

We have shown that a correct decision of the case depends upon the construction to be given to that Act of Congress; our construction gives the title to the plaintiff; while the construction of the same Act, contended for by defendant, gives the title to defendant.

The Circuit Court was of the opinion that as the Act of July 1, 1864, completely divested the United States of all title to the premises, there-

fore the Federal Government and its tribunals remitted the whole subject matter, the law governing the title, as well as the property itself, to the jurisdiction of the State of California and her tribunals.

This is the hinge of the question.

We contend that the United States gave the land to plaintiff; that a fair *construction* of the language of the grant leads to that conclusion. We insist that *the Federal Courts shall construe the federal grant*, under the conviction that the Courts of the grantor are entirely removed from the local influences which might be prejudicial to plaintiff's interests if submitted to the adjudication of the State Courts.

"As this Court has never grasped at ungranted jurisdiction, so it never will, we trust, shrink from that which is conferred upon it." (5 P., 248.)

This then is a suit "arising" under said Act of Congress; a law of the United States, because a correct decision of the case depends upon the construction of the Act containing the grant; and whether the land belongs to plaintiff or defendant, depends upon the meaning of the Act.

This meaning is to be determined by the Courts of the grantor.

By the Constitution, the judicial power of the United States "shall extend to all cases in law and "equity *arising under* * * * *the laws of the* "*United States.*"

The controlling words in this removal Act, are

the same as those in the Constitution, conferring judicial power on the National Courts.

U. S. Cons., Art. 3, Sec. 2.

The meaning of the language *arising under* the laws of United States, &c., is well defined by several decisions at an early period of this Court and since; among them are the following:

Cohen *vs.* Virginia, 6 Wheaton, 379, where it is decided that a case may be said to be one *arising under the Constitution or laws of the United States, if a correct decision of the case depends upon the construction of either.*

There is no ground to question the Constitutional power of Congress to prescribe by Statute the mode of bringing questions before the national Courts.

If the suit is of a kind that the national Courts may properly take cognizance of, then Congress has full power to elect whether the suit may be *removed* from the State Court to the Circuit Court in the first instance and thence to this Court for revision, or whether the case shall go from the State Courts directly to this Court by writ of error or appeal.

If this case comes within the constitutional and statutory designation of "Cases * * in equity "arising under * * the laws of the U. S." then it was properly cognizable in the Circuit Court, and the order remanding it to the State Court for want of jurisdiction was erroneous and should now be reversed.

Upon the ultimate trial of this case, by whatever Court, constant reference must be had to the *grant* contained in the Act of 1864, including the Ordinances therein referred to as a part thereof, in order to decide the case between the parties; for upon the correct construction of that Act the decision depends.

That very necessity of reference to the Act of Congress as the basis of decision makes the suit one of those which the law authorized to be removed to the Circuit Court—a suit arising under the law of Congress.

By the terms of the Act of 1875 jurisdiction is given to the Circuit Courts in these matters of national concern; by the first section certain suits may be commenced therein, and by the second section *the same kind of suits pending in State Courts may be removed therefrom to the Circuit Courts.*

"The power of removal, if it be not unconstitutional, is an appellate power and analagous to a writ of error." Mr. Pinkney's argument in Cohen *vs.* Va., 6 Wheaton 356. * * * Take away both (*i. e.* the writ of error to, and the right of removal from State Courts) and the Constitutional laws and treaties of the Union lie at the mercy of the State judicatures." *Ib.*—also pp 362–3 and 371 of 6 Wheaton—Pinkney's argument which was sustained by the Court.

As to the necessity of giving to the Federal Courts the power to decide all cases of every de-

scription arising under the law, &c., of the U. S. See the opinion of the Court by Marshall, C. J., in Cohen *vs.* Virginia, 6 Wheaton, 382 *et seq.*

The bill makes out a case of title to this land *granted by Congress to plaintiff*, and an attempt on the part of defendant to confiscate his land in spite of the grant, by a *false construction of it.* Plaintiff seeks the protection of the Courts of the Government—the grantor.

This makes a case arising under the law, according to the above decision, p. 103. "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given, &c." *Ib.* p 404.

Miller *vs.* Nichols, 4 Wheaton, 311.

It would have been sufficient to give this Court jurisdiction of the cause that the record should show that *an Act of Congress was applicable to the case.*

Martin *vs.* Hunter, 1 Wheaton, 304.

It is decided that where the question is whether a title was protected by a *treaty*, this Court has power to determine upon the validity of the title.

Substituting *Statute* for the word "treaty," as used in the above case, the reasoning therein will apply to the case at bar.

At page 350, it is shown that all that is said as to Federal jurisdiction under the writ of error, is equally applicable to cases removed into Federal Courts.

Matthews *vs.* Zane, 4 Cranch, 382.

The plaintiff in error claimed title to land in the State of Ohio, under the Act of Congress passed in 1800, and the decision of the State Court was against him.

*The defendant in error also claimed title to the same land under the same Act of Congress.*

*Held* that this Court had jurisdiction.

"It is supposed that the Act intends to give this Court the power of rendering uniform the construction of the laws of the United States and the decisions upon *rights* or *titles claimed under those laws.*"

That is our case: both parties *claim* the land under the *Act of* 1864. The bill sets out the claim of each party respectively. Plaintiff deduces the conclusion from the facts stated, that he gets the title under the Act. Defendant contends for the opposite conclusion.

The decision of the case turns upon the *construction* of the Statute which grants the land—that makes out a case arising under the Act—a case properly cognizable by the Courts of the grantor.

Smith *vs.* Maryland, 6 Cranch, 286.

In Gardiner *vs.* Miller, 47 Cal., 570 and 578, the Supreme Court of California held that the case may be re-examined in the Supreme Court of the United States, under the Judiciary Act, on the question of the Statute of Limitations of the State, as against a United States patent, issued on a Mexican grant, as it involved the *true construction* of the *treaty* with Mexico.

Turton *vs.* U. U. P. R. R., 3 Dillon Reports, 366.

Action for damages against the Company, commenced in State Court, *removal allowed* under Act of July 27, 1868, 15th Stats. at Large, p. 227, on a stipulation that the corporation defendant was organized and acting only under a charter granted by Congress, held to be a suit *arising under laws of United States.*

Orner *vs.* Sanders, 3 Dillon, 384.

Suit by a Collector of Internal Revenue against his deputy, for a defalcation.

Held to be a suit arising under the laws of the United States.

Citing Osborne *vs.* U. S. Bank, 9 Wheaton, 739.

The following is the result of the foregoing authorities:

1st. That the judicial power of the United States extends to *all cases* in law and equity arising under the laws of the United States.

2d. That it is competent for Congress to organize the Federal Courts and to provide for the mode of bringing suits into the same, either by direct process issued by them, or by removal of suits into them from the State Courts, of the character contemplated in the constitution.

3d. That where the question in suit is dependent upon the correct construction of the constitution, or a statute or treaty of the United States, it makes a suit "arising" under the same.

4th. That the Act of March 3d, 1875, under which this suit was removed from the State Court to the Circuit Court, was a lawful exercise of constitutional power.

5th. That as the correct decision of this suit by whatever Court, turns upon the meaning and construction to be given to the Act of Congress of July 1st, 1864, it makes the present suit one arising under the laws of the United States, cognizable in the Circuit Court.

S. W. HOLLADAY,
Atty. for Appellant.

October 21st, 1876.

Chouteau vs Eckhart 2 Howard 372
"But each party claims by force of an act of Congress ×× construction is called for on the acts on which both titles are founded"
Jurisdiction entertained
Dallards Heirs vs Kibbin 14 Peters 254
City of Mobile vs Eslava 16 Peters 234
Berthold vs Mc Donald 22 Howard 334
Railroad vs Richmond 15 Wallace 3

S. W. Holladay
Atty for Appellant

No. .....

# In the Supreme Court

OF THE

# UNITED STATES.

FROM THE NINTH CIRCUIT.

MILO HOADLEY,
*Complainant and Appellant,*

vs.

THE CITY AND COUNTY OF SAN FRANCISCO,
*Defendant and Respondent.*

## *Brief for Appellant in Reply.*

S. W. HOLLADAY,
Counsel for Appellant.

SAN FRANCISCO:
BONNARD & DALY, BRIEF AND TRANSCRIPT PRINTERS, 609 Merchant Street.
1876.

# IN THE SUPREME COURT

OF THE

# UNITED STATES.

MILO HOADLEY,
*Complainant and Appellant,*

*vs.*

THE CITY AND COUNTY OF SAN FRANCISCO,
*Defendant and Respondent.*

## REPLY TO RESPONDENT'S BRIEF.

I.

Counsel for respondent, at pp. 9 and 23 of their Brief, assume that the legal effect of all the issueable matter in complainant's bill is to show that the legal title to the land comes to the plaintiff from the *city or pueblo*, and not from the Act of Congress of 1864, and hence, that the construction of the Act is not called in question.

We submit that the bill shows just the contrary, to wit: that the title comes directly from the Act of Congress, operating upon and giving effect to the pre-existing but invalid legislation by the city

and State—invalid for want of title in the city and State as against the paramount authority in Congress to ultimately dispose of the title, as was done by the Act of 1864.

See paragraphs 39, 40, 41 of the bill.

II.

In our former brief we have shown it to be the well-settled law by a uniform series of decisions of this Court and of the Courts of California, that the *title to the land in question came from the United States* to one or the other of the parties to this suit, *by the Act of Congress of July* 1, 1864, which Act appears at paragraph 39 of the bill and at p. 5 of our former brief, and at page 13 of respondent's brief.

III.

The only question at present involved is that of jurisdiction, determinable upon the fact whether or not the Act of Congress is to be considered and construed by the Court in trying the cause.

**Respondent's Counsel have done us a great service in their Brief by showing that the construction of said Act of Congress is the real and only question involved.**

As follows:

1st. At page 4 of their brief, they cite the decision of the Supreme Court of California, (50 Cal., 265,) to show that the "Statute of Limitations "could not commence to run *until the passage of* "*the Act of Congress of July* 1, 1864."

2d. That said Act "did not destroy or in any respect impair the dedication, but on the contrary," &c.

3d. (At page 5 of their brief.) "That the *title which the United States held in the land, and which was transferred to the city* BY THE ACT OF CONGRESS, was so transferred to the city in trust for the purpose expressed in the *Statute* of March 11, 1858, and for no other purpose."

That is the construction which respondent gives to said Act of Congress, while plaintiff, on the contrary, claims that the true construction of the Act is as it reads; that is, it gives the land to the city and its successors for the uses and purposes specified in the *Ordinances*, and not as construed in the opinion cited, giving the land to the city for the uses and purposes specified in the *Act* of the *State Legislature*, passed in 1858.

In that opinion, the language of the Act of Congress in that vital particular is three times misstated, substituting the *Act* of 1858 for the word "Ordinances," employed in the Act of Congress.

Such zeal for the supposed public interests has made it necessary to change the language of the grant in construing it, to defeat a right which the plain words would otherwise give to the plaintiff, illustrates the wisdom of the law which enables appellant to seek a forum removed from all local interest or bias, namely, the Courts of the United States, the grantor, whose grant is to be construed, and according to whose construction the title goes to one or the other of these parties.

4th. Again, at pp. 8 and 9 of their brief, they insist that, according to the true construction of the law, our title comes from the city and not from the Act of Congress.

5th. At p. 10 Sub. V. of their brief, they assume a certain construction of the Act of 1864, and still deny us the right to assert a contrary meaning for the Act, which is the whole question at issue.

At page 13 of their brief, they put their construction upon said Act of Congress, saying, "Congress did not relinquish or grant for any other than the uses and purposes therein expressed."

Now, that is the very question which we desire to submit to the Federal Courts—to construe the Act of Congress and to decide which of these parties gives it the true construction.

Such necessity makes this a case arising under the law to be construed.

6th. At p. 15 of respondent's brief, they proceed still further to prove that their construction of the Act is the correct one.

Thus, they proffer a question for decision by this Court, which *must have jurisdiction in the case* before it can decide the *question in their favor.*

Jurisdiction lies in the road leading to the decision of the point proposed.

7th. At p. 14 of their brief, they say that we contended in the Circuit Court that the true meaning of the Act of Congress was to recognize a distinction between the words "Ordinances" and "Order," as used in the Act of our Legislature of 1858.

They go on and attempt to prove that we are wrong, and they desire this Court to so decide.

This Court must take up the case and see what the Act of Congress says, and to determine what it means, before deciding whether we are right or they are right.

In order to so decide, the Court must have jurisdiction, and that is the whole question.

8th. At p. 16, they continue the same reasoning to prove the error and bad consequences to flow from our construction of the Act of Congress, *to prove that we have no right to be heard in a National Court*—to prove that because our construction of the Act is false and absurd, that therefore the Court has no jurisdiction to hear us.

9th. At p. 19 they say: "It is apparent that *Congress intended* to put in operation the Ordinances and the Act of the Legislature;" &c. * * "because the *scope of the Act of Congress* was to be within that of the Act of the Legislature, with reference to the same subject," &c.

This Court must take *jurisdiction* of this case before it can decide that they are right and we are wrong upon these questions as to the meaning of said Act of Congress, else their brief has no application to the present inquiry.

FINALLY, it appears by the bill, 1st. That plaintiff, by his possession of the land, claims title under and connects himself with the grant of the land by Congress in 1864.

2d. By the authorities cited in our first brief

as well as by the concessions in respondent's brief, it appears that the title comes to one or the other of these parties by said Act of 1864.

3d. That if respondent's counsel are right in their construction of that Act, the plaintiff gets no title, but defendant (respondent) does.

4th. Respondent's argument is chiefly directed to show that our construction of the Act of 1864 is wrong and absurd, and they practically invite this Court so to decide ; but before the Court can give affirmance to respondent's desires in that particular, the Court must necessarily take up the case and expound the Act of 1864. And in doing so, the Court is exercising jurisdiction in the case, which is all we are now contending for.

5th. After the Court shall have taken jurisdiction, the plaintiff will then be permitted to reply to defendant's argument as to the true meaning and construction of the Act of 1864.

Such reply has no place in the present inquiry.

S. W. HOLLADAY,
Atty. for Appellant.

Nov. 20, 1876.

*No.* .....

October Term, 1876.

IN THE

# SUPREME COURT

## Of the United States,

FROM 9TH CIRCUIT, DISTRICT OF CALIFORNIA.

MILO HOADLEY,
*Complainant and Appellant,*

vs.

THE CITY AND COUNTY OF SAN FRANCISCO,
*Defendant and Respondent.*

## Brief for Respondent, on the Question of Jurisdiction.


DELOS LAKE,
*Attorney for Respondent.*

W. C. BURNETT,
*Of Counsel for Defendant.*


*Due service of a copy of this Brief is hereby acknowledged this Saturday, November 11th, A. D. 1876, as within time.*

.....
*Attorney for Appellant.*

*Filed November* ..... *A. D. 1876.*

.....
*Clerk.*
*Of the Supreme Court.*


Cubery & Co., Printers, 414 Market St., below Sansome.

*No.* .....

IN THE

# SUPREME COURT

OF THE

## UNITED STATES.

FROM NINTH CIRCUIT DISTRICT OF CALIFORNIA.

MILO HOADLEY,
*Complainant and Appellant,*
vs.
THE CITY AND COUNTY OF SAN FRANCISCO,
*Defendant and Respondent.*

**Respondent's Brief on Demurrer to Bill on the Question of Jurisdiction.**

Chronological History of this Cause.

This cause was commenced in the 12th District Court of the State of California, in and for

the City and County of San Francisco, on the fifth day of January, 1870, and the plaintiff having amended his complaint on the twenty-sixth day of September, 1870, asking that his title to the premises therein described be quieted, that he be decreed to be the owner, etc., and an answer having been filed, a trial resulted in a decree for the plaintiff, as prayed, in 1871, and upon an appeal by defendant from such decree, and from an order denying her a new trial, that decree was set aside, and a new trial directed by the Supreme Court of the State of California. [January Term, 1875: 50 Cal. R., 265.]

By that decision the Supreme Court of California determined the law of the case in the particulars following, viz:

1 — That the title vested in the plaintiff under the Van Ness Ordinance and the Confirmatory Acts, unless the squares were selected and dedicated as public squares.

2 — That the order adopted the plan or map reported by the Commissioners, and declared it to be "the plan of the city in respect to the location and establishment of streets and avenues, and the reservation of squares and lots for public purposes" in that portion of the city ly-

ing west of Larkin and south-west of Johnston streets; that the Act of March 11, 1858 [STATUTES OF CAL. OF 1858, p. 52 *et seq.*], ratified and confirmed the ordinances and the order.

3 — That the ordinances and the order were void at the time of their adoption, so far as they attempted to convey titles to private persons, and to select and dedicate to public use the squares involved in this case.

4 — That the Act of March 11. 1858, ratifying and confirming the ordinances and order there recited, operated as a selection and dedication to public use of the squares in controversy, and that no other or further acceptance by the public than was afforded by that Act was needed in order to make the dedication complete.

5 — That the plaintiff did not acquire any title to the squares under the operation of the Act and the ordinances thereby confirmed.

6 — That the statutes of limitation

could not commence to run until the passage of the Act of Congress of July 1, 1864 [13 U. S. STAT. AT L., p. 333, SEC. 5], granting and relinquishing the title of the United States to the city. That the evidence was sufficient to show adverse possession, if the statute is applicable to the property in controversy. That the use to which the squares were dedicated vested IN THE PUBLIC, and not in the city, as a municipality, or in her inhabitants, and that in this respect they stand like the streets of a city, or the highways in a county; but that the duty of regulating, improving, and protecting the squares is imposed on the city by the statutes providing for the city government. That the *Act of Congress* of July 1, 1864, did not destroy, OR, IN ANY RESPECT, IMPAIR THE DEDICATION, but, on the contrary, by granting and relinquishing the title of the United States to the city, for the uses and purposes mentioned in the Act of March 11, 1858, it ratified and confirmed the dedication and made it operative upon the legal title, as well as such title as

the city held prior to the Act of July 1, 1864, and thus virtually perfected the dedication. That when such lands have been held adversely under such circumstances, and for such a period, that a title held by a private person, or by a municipality, or by the State, as a private proprietor, would be extinguished under the operation of the Statute of Limitations, such adverse possession will not extinguish a public use if the lands have been dedicated to that purpose, and will not bar the rights which the public gained by the dedication. That the Statute of Limitations was not intended as a bar to the assertion by the public of rights of that character. That the title which the United States held in the land, and which was transferred to the city by the Act of Congress, was so transferred to the city in TRUST, for the purposes expressed in the statute of March 11, 1858, and for no other purpose. That the TITLE was granted to the city in trust, FOR PUBLIC USE; and the city had no authority by virtue of either the statute of March 11, 1858, or

of the Act of Congress of July 1, 1874, to alienate or in any manner dispose of it, BUT ONLY TO HOLD IT FOR THE PURPOSES expressed IN THE STATUTE.

That these lands were granted to the city FOR PUBLIC USE AND ARE HELD EOR THAT PURPOSE ONLY. That they cannot be conveyed to private persons AND ARE EFFECTUALLY WITHDRAWN FROM COMMERCE. That the CITY having no authority to convey the title, PRIVATE PERSONS ARE VIRTUALLY PRECLUDED FROM ACQUIRING IT. That the land itself, and not the use only, was dedicated to the public. THAT LAND HELD FOR THAT PURPOSE, WHETHER HELD BY THE STATE OR A MUNICIPALITY, IS NOT SUBJECT TO THE OPERATION OF THE STATUTE OF LIMITATIONS.

While the cause was awaiting another trial in the Twelfth District Court it was removed to the Circuit Court at the instance of the plaintiff.

The bill now under consideration was filed in the Circuit Court on the twelfth day of January, 1876.

A demurrer thereto, that the same does not state facts sufficient to constitute a cause of ac-

tion, and that the Circuit Court has no jurisdiction of the action, was filed on the seventeenth day of January, 1876.

The BILL, *for the purposes of said demurrer*, taken as true EXCEPT WHEREIN IT MAY STATE FACTS FALSE IN LAW, is, as we understand it, substantially this:

That appellant has been in possession of the two parcels of land described in his bill ever since a period commencing in 1850, having it inclosed and claiming the same as parts of a large tract of land within the pueblo limits of San Francisco, which he has during that time held in possession in one body.

The appellant claims to be the owner in fee simple, and to have acquired title under what are commonly known as the Van Ness Ordinances (which are the three (3) ordinances set forth in said Act of March 11, 1858, Stat. of Cal., p. 52), the premises being situate in the "WESTERN ADDITION;" and the bill sets forth many of the facts showing the adoption of those ordinances, the passage of the Act of the Legislature of March 11, 1858, confirming them, etc, the passage of the Act of Congress of July 1, 1864, the petition of the city of San Francisco to the Board of U. S. Land Commissioners, and the rendition of the *decree* of the Circuit Court by Justice Field, of June 18, 1865.

The bill shows that respondent was never *in* actual possession.

The bill also shows that the PREMISES described therein were LAID DOWN by the Commissioners appointed by the Common Council, upon a MAP, as parts of "ALTA PLAZA" and "HAMILTON SQUARE," and that at the time of the confirmation of the Van Ness Ordinances by the Legislature, by the Act of March 11, 1858, the map itself was adopted and confirmed BY THE VERY SAME ACT.

The bill alleges that in laying out the Western Addition, or the property west of Larkin and south-west of Johnston streets, and in adopting said map (which is commonly known as the Van Ness map), more than one twentieth of the lands in possession of appellant, exclusive of the streets, were taken for public purposes as parts of said public squares; that he has never received any compensation therefor from respondent, and that he has never conveyed the same to the city of San Francisco or to respondent.

The bill makes appellant's SOURCE OF TITLE to the lands of which he claims to have been and to be in possession, and the SOURCE OF THE TITLE of the PUBLIC in the premises described in the bill as claimed to be parts of public squares, THE SAME. The source, AS SHOWN BY THE BILL, *is* the action of the Common Council of the City of San Francisco, of the Board of Supervisors of the City and County of San Francisco, and of the Legislature of the State of California.

The respondent claims that the premises form

parts of "*Alta Plaza*" and "*Hamilton Square*" ND ARE DEDICATED TO PULIC USE.

federal question is involved. The city title is not drawn in question. The real controversy is as to the transfer of the city title to appellant, and this does not depend upon the Constitution, or any treaty or statute of or commission held, or authority exercised UNDER the United States.

The appellant asks that his title be quieted, etc., and that it be decreed that defendant has no right, etc., and that the premises are no part of any public square, park, or plaza, etc.

## Points in Controversy.

I.

HAS THIS COURT JURISDICTION?

*a.* Is any Federal question involved?

*b.* Is the city title drawn in question?

*c.* Is the real controversy as to the transfer of the city or pueblo title? *and*, if so, does this controversy depend upon the Constitution or any treaty or statute of, or commission held, or authority exercised under the United States?

II.

What was and is the effect of ordinances 822 and 845, and the ordinance of the Board of Supervisors, commonly known as the Van Ness Ordinance, and of the Act of the Legislature of California of March 11, 1858, with reference to the title, right of possession, and use of the premises described in the bill?

III.

Was the plan and map confirmed by the Act of March 11, 1858?

IV.

If the ordinances and map or plan were confirmed by the same Act of the Legislature, would the reservations to public uses be first held, and next the remainder to the use of private parties; and would the fact of non-payment by the city, or of taking more than one twentieth of the lands in possession of one person vitiate the map or plan with reference to the reservations attempted to be made?

V.

If the premises were dedicated to public use as parts of public squares, has the possession thereof by appellant deprived the public of their rights therein, pursuant to the Statute of Limitations of the State of California? And preliminary to this question, IF THE DEDICATION BE FOUND, *has this Court jurisdiction to determine the question whether a title was subsequently acquired under a State statute of limitations;* AND TO ADJUDGE THAT THAT TITLE WHICH WAS, UPON THE PASSAGE OF THE ACT OF CONGRESS OF JULY 1, 1864, IN THE PUBLIC, HAD BY VIRTUE OF SUCH LIMITATION STATUTE BEEN THEREAFTER TAKEN FROM THE PUBLIC AND VESTED IN A PRIVATE CITIZEN?

**Status or Character of the Parties and Foundation of Claim of Jurisdiction Advanced by Appellant.**

The appellant is a resident and citizen of San Francisco, and the respondent is a public corporation of California; therefore no claim is or can justly be made by appellant that the Circuit Court is entitled to jurisdiction by reason alone of the PARTIES.

The appellant chose the forum in 1870, but now insists upon the right of removal to the Circuit Court, pursuant to Sections 2 and 3 of the Act of Congress of March 3, 1875, entitled "An Act to Determine the Jurisdiction of Circuit Courts of the United States, and to regulate the Removal of Causes from State Courts, and for other Purposes (Stat. at L., Vol. 18, Part 3, p. 470; *ib.* Desty's Federal Procedure, p. 71), on the ground that the matter in dispute exceeds, exclusive of costs, the value of $500, and arises under a law of the United States.

No question arises under the Constitution. No right of appellant in the lands is affected or supported by the Treaty of Guadalupe Hidalgo. The most that can be claimed under that treaty is, that as there was a pueblo at San Francisco, it should be respected so far as rights in property in the pueblo lands had been acquired under the pueblo at the date of the treaty. Appellant makes no such claim.

Upon a submission of the cause on the demur-

rer the Circuit Court sustained the demurrer, on the ground of want of jurisdiction in that Court, and ordered that the cause be remanded to the State Court [pursuant to Section 5 of the Act of Congress of March 3, 1875].

From the decision sustaining the demurrer and remanding the cause the present appeal was perfected.

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## I.

### Has This Court Jurisdiction ?

*a — Is any federal question involved?*

We contend that there is none. The bill makes the source of title to be the ordinances commonly known as the Van Ness Ordinances and the Act of the Legislature of California, of March 11, 1858. [Stat. p. 52.] We find, upon an investigation of the bill, that this is the claim legally appearing upon its face, although there is something of mere assertion at variance with that position to be found therein. The idea which we wish to convey is, that although there is some thing asserted merely as the conclusions of appellant, that the title comes from the Act of Congress direct to him, yet, as matter of law, it appears from the bill that the source of title, back of which we can make no inquiry as between these parties, is the said ordinances as confirmed

by said Act of March 11th, 1858. (*See Bill, paragraphs* 24, 29, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45.)

The Act of Congress of July 1, 1864, relinquished and granted "*all the right and title of the United States*" TO THE SAID CITY AND ITS SUCCESSORS, *for the uses and purposes specified in the ordinances of said city, ratified by an Act of the Legislature of the said State, approved on the eleventh of March, eighteen hundred and fifty-eight, entitled "An Act concerning the City of San Francisco, and to ratify and confirm certain ordinances of the Common Council of said city.*"

(U. S. Statutes at Large, vol. 13, p. 333, section 5.)

This Act of Congress granted to the city, primarily, EVERYTHING. Whatever any person, body politic, or the public, take in the lands relinquished or granted by that Act must be taken under and pursuant to the provisions of the ordinances and the Act of the Legislature mentioned in the Act of Congress, because Congress did not relinquish or grant for any other than the "USES AND PURPOSES" therein "SPECIFIED."

We might rest the proposition which we now make, that no Federal question is involved, upon the above statement of the provisions of the Act of Congress, and the very natural conclusion that we must look to the ordinances as set forth in the Act of the Legislature referred to, and to the Act of the Legislature itself, alone, for a solution

of any difficulty in which we may find ourselves as to the real "USES AND PURPOSES" which are therein specified; were it not for the proposition advanced by counsel for appellant, in the Circuit Court (AND WE DARE NOT PASS OVER SUCH A POINT IN SILENCE BECAUSE OF THE FACT THAT APPELLANT HAS NOT MENTIONED IT IN HIS BRIEF), that because the third "*ordinance*" set forth in the Act of the Legislature of March 11, 1858, is therein mentioned in one place by the name of "*order*," and the Act of Congress only mentions "*ordinances*," we must go to the Act of Congress for a definition of the word "*ordinance*," as applied to this subject, and that by the use of the word "*ordinances*" in the Act of Congress, Congress made reference to two *things* that were called "*ordinances*," and had no reference to the thing called an "*order*," although it was in fact and in law as much an "*ordinance*" as either of the others, in every essential.

This position was taken, although the enacting clause of the so-called order reads: "THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, DO 'ORDAIN' AS FOLLOWS:' [Stat. of Cal. of 1858, p. 56.]

Even were this proposition of counsel correct, it would not leave the question of title to rest upon the Act of Congress, as between these parties.

The Act of Congress does not specify the "*uses and purposes*." It does not *define* the word "*ordinance*."

It does not state *what* ordinances were ratified by the Act of the Legislature.

It is apparent, upon a reading of the Act of Congress, that ALL *of the lands within the charter limits, as prescribed by the Act of* APRIL 15, 1851, incorporating the city, except United States reservations and lands legally granted by Spain, Mexico, or the United States, were to pass, by virtue of the relinquishment and grant made thereby, to the city and its successors. Then there would be nothing left. All title passed from the United States. Everything went instantly as of the date of the Act of Congress, or perhaps as of the date of the Act of the Legislature.

To whom did it go? To whom is it evident it was to go? *To the city and its* SUCCESSORS. But if the proposition of counsel is correct, everything went to "*its successors.*" The ordinance mentioned in the Act of the Legislature as an "*order*," being left out or disregarded, we have not a single foot of reservation out of these Western Addition lands made for the use of the city or of the people, not even for streets, or school-lots, or engine-houses, and we have no *legal plan* of that part of the city. This latter fact follows, among other reasons, because, by the Act of the Legislature confirming the ordinances, the plan and map were adopted and the possessors given to understand that the city would not thereafter make a different plan or map, or take

any other lands for streets, etc., than those thereby indicated. The city was left with the power to *open* the streets *as laid down on that map, but without the power to lay out new or other streets*, etc.

This conclusion being inevitable from an admission of the correctness of the proposition of counsel we would be thereby forced to the conclusion that the words "*to the said city and*" occurring in the Act of Congress are meaningless, as they are there placed and are not in that relative position in the sentence, with respect to each other, that Congress intended, and that what Congress intended to do was to leave out the word "*and*," and have the language simply "*to those private persons who are successors to the said city.*'

Almost any intelligent gentleman, not a lawyer, would probably wonder why Congress did not say so if it wanted to.

Nothing of the kind was wanted. Nothing of the kind was intended. The Act of Congress was intended as an Act for the repose of titles, both public and private. It was to settle every question as to the validity of the so-called Van Ness ordinances, by granting to the same uses and purposes as prescribed by those ordinances. And, in so doing, the Act was made to refer in general terms to the ordinances as those ratified by a certain Act of the Legislature. The three ordinances ratified by that Act of the Legislature

had been referred to by the State and United States Courts, and in Acts of the State Legislature, in discussions in Courts of law, in the press, and by the people constantly, for years before the passage of that Act of Congress, as the *Van Ness Ordinance.*

THESE ORDINANCES, ratified by the Act of the Legislature, were:

1st. Ordinance 822.—Ordinance for the settlement and quieting of the land titles in the City of San Francisco. (Stat. of Cal. of 1858, p. 52.)

2d. Ordinance 845.—Ordinance providing for selecting and designating public squares and reservations for hospitals, fire engines, and school purposes, and for adopting the plan of streets in the western and south-western portion of the city, according to the provisions of Ordinance number eight hundred and twenty-two, and confirmatory of said Ordinance number eight hundred and-twenty two [Stat. of 1858, p. 55.] And,

3d. The Order or Ordinance of the Board of Supervisors, dated sixteenth of October, 1856. [Stat. 1858, p. 56.]

They were understood to constitute one undivided whole.

They were ratified *by one act, at the same instant*, and, so far as the State could do it, were put in operation by that Act, and were in fact

held by the courts to be the foundation of title to lands in the Western Addition, and that plan and map to be the legal plan and map thereof, before the passage of the Act of Congress. The thing called an "*order*," is in fact and in law an "*ordinance*." It possesses all of the ingredients of an ordinance.

It is "*a law of a corporation*," and this is the substance of the definition of the word ordinance. (Bouvier.)

It was a law of a corporation, ratified by an Act of the Legislature. It established a rule by authority, within the definition of Webster.

Counsel were mistaken when asserting that under the Consolidation Act of 1856 the most solemn acts of the Board of Supervisors are to be known as orders and not as ordinances. There is therein provision for the ordering of the payment of moneys, and some persons connected with the city and county government have therefrom concluded that what was formerly called an ordinance was to be called an order. In this they erred, as ordinances are expressly mentioned in that most important section of the Act consolidating the government of the city and county, *viz: Sec.* 68, [*Statutes of* 1856, *p.* 164.]

*That section has never been amended.*

The Act of Congress does not make any distinction between the "*city*" and its "*successors*," with reference to the right to claim under the ordinances that were confirmed by the Act of the

Legislature, or under the Act itself, but relinquished and granted something to each, although ALL were to hold directly UNDER AND PURSUANT TO THE ORDINANCES AS RATIFIED BY THE ACT OF THE LEGISLATURE. On going to the Act of the Legislature we find that the so-called *order* is the only ordinance under which the city could claim or have *anything*. The Ordinance 822 purported to grant every inch of land to the possessors, except such as was to be reserved to public uses; and it assumed that *all of the lands were in possession of private persons*, and the Legislature confirmed that ordinance WITH THE OTHERS, and the Act of Congress evidently granted the whole "*for the uses and purposes*," etc.; and the lands cannot be devoted to any other use or purpose. It is apparent that Congress intended to put in operation the Ordinances and the Act of the Legislature, so that just what the Legislature had purported to do by the Act of March 11, 1858, should be done thereunder, and used apt words to express that intention. Then we must look to that Act of the Legislature to find what the Legislature intended, and also for the *definition* of the word "*ordinance;*" because the scope of the Act of Congress was to be within that of the Act of the Legislature, with reference to the same subject, and to ratifying and confirming the ordinances. But in deducing from the Act of the Legislature a definition of the word ordinance, we should

take into consideration the legal definition of that word, as applied to the Acts of the Board of Supervisors under the Consolidation Act, and the general laws as in force at that time.

By doing so we are forced to the conclusion that the so-called "*order*" is an "*ordinance*;" that in this investigation we have not been assisted to our conclusions as to the respective rights of these parties to the lands in controversy *by the Act of Congress*, but are stopped at and are to consider solely the Act of March 11, 1858; and that no Federal QUESTION IS INVOLVED.

*b.—Is the city title drawn in question?*

We urge that it is not. On the contrary, the appellant shows a perfect title to have vested in the city so far as Mexico or the United States have parted with title. This is shown by pleading the Act of Congress of July 1, 1864, the decree of Justice Field of June 18, 1865, and the Act of Congress of March 8, 1866.

Of these supposed sources of title the Act of July 1, 1864, is the elder, *and conveyed all.*

The appellant ought not to be permitted to challenge the legitimate conclusions to be reached by a consideration of his own pleading.

He has, perhaps, stated more matters of law than pertain to his case; but, if that be so, the Court will not thereby be prevented from taking his allegations concerning the Act of July 1, 1864, the ordinances and the Act of March 11,

1858, as correct statements of the law, without reference to the other allegations, and finding the true source of title accordingly. The APPELLANT does not then, by his pleading, draw in question the title of the city, under the Act of Congress of July 1, 1864, nor the fact that that city title is the true source of all titles held by the parties in this case, or either of them, or the public. The effort is made in his pleading to show that such city title has been assigned to appellant by virtue of the ordinances, while the real effect of the pleading is to prove that it has gone to the public, and is only held by the defendant for the public.

No question is raised by the bill, as to the validity or operative effect of the Act of Congress of July 1, 1864.

The effort made in the bill to show such possession as would, according to appellant's claim, transfer the title of the city, or of the public, to him under the operation of the Statute of Limitations of the State, is necessarily based upon the assumption that the city title had been perfected by the reception of the Mexican or United States title before the statute commenced to run. Such an effort does not draw the city title in question as the common source of title.

*c.—Is the real controversy as to the transfer of the city or pueblo title? and, if so, does this controversy depend upon the Constitution or any treaty or statute of, or commission held, or authority exercised under the United States?*

With respect to source of title as originating in the City of San Francisco, the bill is drawn with a double aspect.

First. It shows that there was a town or pueblo existing prior to the treaty of Guadalupe Hidalgo, at the place afterward called the City of San Francisco, claiming title in her corporate capacity to four square leagues of land, including the land described in the bill, which town or pueblo continued until the incorporation of the City of San Francisco. [*Bill, Subdivision* 5.] This would of course have entitled the city to the four square leagues as the successor of the town or pueblo. The decree of Justice Field of June 18th, 1865, confirming the pueblo title is stated.

Second. It shows the passage of the Act of Congress of July 1, 1864, conveying to the city and its successors, thereby anticipating the decree of Justice Field of June 18, 1865, nearly a year.

In either case, the conclusion to be reached upon a legal construction of the provisions of

the bill is, that the title first acquired, by whichever of these parties or the public it was received, was so acquired from the City of San Francisco, or the City and County of San Francisco, by which latter name the corporation of the City of San Francisco was continued in existence by virtue of the first section of the Act of April 19, 1856, consolidating the city and county governments.

As the title comes from the city, we conclude *that the real controversy is as to the transfer of the city or pueblo title.*

*The title having been in the city, this controversy does not depend upon the Constitution or any treaty or statute of, or commission held, or authority exercised under the United States.*

If the premises are parts of public squares, the use thereof and the title is in the PUBLIC, and the PUBLIC acquired the title from the city pursuant to the ordinances.

*d.— This Court has no jurisdiction to try or determine the question of title acquired under the Statute of Limitations of the State of California, in this cause.* Because,

1. The appellant could acquire no title as against the United States by virtue of such statute.

2. The City of San Francisco is the source of title, and it is for the State Courts alone to determine judicially who has acquired such title from her (as between citizens of California).

3. If the public acquired that city title, any title acquired from that public whose trustee the respondent is, by the appellant, by virtue of the Statute of Limitations, would be a *newly-acquired title*, not depending upon the city title, but resting wholly upon such Statute of Limitations.

The question under the statute would be whether, by virtue of the adverse possession of the premises by the appellant, that which was at one time in the public by virtue of a legal dedication to public uses, had been acquired by him.

The question would necessarily be whether one of these parties have, by virtue of the Statute of Limitations, acquired the title of the other?

What has a United States Court to do with that question, AS BETWEEN THESE PARTIES?

It appearing that no federal question is involved; that the city title is not drawn in question; that the real controversy is as to the transfer of the city or pueblo title, *and* that such controversy does not depend upon the Constitution or any treaty or statute of, or commission held, or authority exercised under the United States; that United States Courts have no jurisdiction by reason of the subject-matter to try or determine the question whether one of the parties has

acquired a title from the other by virtue of adverse possession pursuant to a State statute of limitations; that the sole ground upon which jurisdiction is claimed for this Court is, that the matter in dispute exceeds, exclusive of costs, the value of five hundred dollars, and arises under the laws of the United States, and not that the status of the parties gives jurisdiction; that the bill filed discloses to the Court those facts showing a want of jurisdiction; and the objection that there is a want of jurisdiction over the *subject-matter* being one that may be made at any time, we respectfully submit that there is no jurisdiction in this Court over the subject-matter presented for our consideration by the bill, and that the Court ought so to determine.

*See McStay et al.* vs. *Friedman, U. S. Supreme Court, Oct. Term*, 1875.

At the oral argument in the Circuit Court it was persistently stated, by one of the learned counsel for the appellant, that that cause was not similar to the one before the Court, as to the issues presented, and that the opinion was not pertinent authority.

We beg the liberty of again presenting that opinion in full; but before doing so will, in as few words as may be, mention the issues as presented therein, and the decision of this court thereon.

The action was ejectment for certain lands

confirmed to the city of San Francisco, by the Act of March 8, 1866. (14. Stat. 4.)

Plaintiff relied upon prior possession, and did not attempt to connect himself with the city title. But the defendants, *who were the plaintiffs in error*, plead: 1st. Adverse possession, to bring themselves within the Statute of Limitations; 2d. The title of the city of San Francisco, under the Act of Congress, and an assignment of that ttitle to themselves, pursuant to the provisions of an ordinance of the city and an Act of the Legislature of California.

These issues, presented by the defendants, were before, and considered by, the Supreme Court of the United States in determining their rights as plaintiffs in error. This was so, of course; but it is proven to have been so by the fact that the Chief-Justice mentions them at all in the opinion. They were mentioned as the foundation upon which to rest the opinion.

And with those issues before it, the Court say, that at the trial no question was raised as to the validity or operative effect of the Act of Congress; that the effort of the plaintiffs in error seems to have been: 1. To establish their defense under the Statute of Limitations; and, 2. To prove such possession as would, according to their claim, transfer the city title to them under the operation of the city ordinance and the Act of the Legislature.

Upon a motion to dismiss for want of jurisdic-

tion this Court held: 1. That no Federal question was involved in the Supreme Court (meaning the Supreme Court of California, from which the cause went); 2. That the city title was not drawn in question; 3. That the real controversy was as to the transfer of that title to the plaintiffs in error, and that this did not depend upon the "Constitution or any treaty or statute of, or commission held, or authority exercised under the United States;" 4. That the case must be dismissed.

We urge that the case was on all fours, like the one under consideration, in the particulars necessary to a determination in favor of the respondent of the question of jurisdiction.

The opinion in full, for convenience, is printed at the close of this brief.

II.

An examination of the ordinances and the Act of March 11, 1858, will warrant us in urging a point made in the State courts in this cause, to show that it is not necessary to construe the Act of Congress in order to determine the questions at issue between these parties, viz: THAT THE *lands described in the* BILL *were excepted, reserved, and dedicated to public use as parts of public squares, by virtue of "An Act concerning "the City of San Francisco, and to ratify and "confirm certain Ordinances of the Common Coun- "cil of said City," approved March* 11, 1858. (*Stat. of* 1858, p. 52.)

That Act, in its very title, proposes to ratify and confirm *several* ordinances.

In the body of the Act are mentioned the ordinance of twentieth June, 1855, numbered 822: "Ordinance for the Settlement and Quieting of "the Land Titles of the City of San Francisco;" also, Ordinance of September 27, 1855, numbered 845: "Ordinance providing for selecting and designating *Public Squares and Reservations* for "hospitals, fire-engines, and school purposes, and "for adopting the plan of streets in the western "and south-western portion of the city, according "to the provisions of Ordinance number eight "hundred and twenty-two, and confirmatory of "Ordinance number eight hundred and twen-"ty-two;" *and an order adopted, approved, and ratified by the Justices of the Peace, exercising the powers of a Board of Supervisors of the City and County of San Francisco, and bearing date the sixteenth day of October*, 1856, and the said order and ordinances are therein confirmed. Stat. 1858, pp. 52-56.)

We here bear in mind that this so-called "order" is an ordinance as before urged.

By virtue of the Act of March 11, 1858, each of said ordinances and said order went into operation conjointly with the others, *and they are to be so construed, together with the Act of the Legislature itself, as to carry out the intent of the Legislature as ascertainable from the reading of the whole Act, and apparent upon its face.*

Seabury *vs.* Arthur, 28 Cal. 142.

And no matter whether the title of possessors may date by relation to the first day of January, 1855, or to any other time, still it can only be a title to such lands as they were possessed of, exclusive of all exceptions, public squares, and reservations. Sec. 6 of Ordinance No 822 mentions public squares not to embrace more than one block; but the Act of March 11, 1858, refers to *a plan and map* for the location of streets, public squares, and lots for public uses, to be laid out west of Larkin and south-west of Johnston streets. (Stat. 1858, pp. 55, 56.) That *plan* and *map* are adopted as one and the same thing, and declared to be the plan of the city in respect to the *location and establishment* of streets and avenues *and the reservation of squares* and lots for public purposes, in that portion of the then incorporated limits of said city lying west of Larkin and south-west of Johnston streets, and that order was confirmed. (Stat. 1858, p. 56.) By the *plan* and *map*, so confirmed, the public squares were legally made to include *four blocks each*. By adopting and confirming that plan and map the Legislature plainly said that the grant of title to persons in possession was only of such lands as were not therein and thereon shown to be set apart for public use.

In all of the decided cases, wherein the Van Ness Ordinance has been held valid, the validity thereof seems to have been based upon the Act of March 11, 1858. And, in fact, nothing but an

Act of the Legislature or of Congress could have validated that ordinance.

The ordinances and Acts of the Legislature *for what they are worth*, are in evidence: "It "shall be the duty of all courts and officers to "take judicial notice of the said order and ordi- "nances, *as hereinbefore recited*, without further "proof." (Stat. 1858, p. 56, end of Sec. 1.)

The position that the reservations are void, because: 1. The Common Council did not appoint Commissioners within six months after the passage of Ordinances 822 and 845 or either. 2. The Commissioners did not report within the time required by the Ordinance 845; and, 3. The reservations were not selected within the time prescribed by the Ordinances 822, 845, or either; and all other positions based upon inaction on the part of the city authorities fall to the ground, if our proposition be correct, that it is by virtue of the confirmatory Act of the Legislature of March 11, 1858, that the plan and map were confirmed and vitality infused into the ordinances. The like result follows, if it be true that such result is to be found only from the Act of Congress of July 1, 1864, as basing title pursuant to the Act of March 11, 1858, and the ordinances thereby confirmed. Whether the ordinances acquire their validity by virtue of the Act of March 11, 1858, or the Act of Congress of July 1, 1864, it is plain that all the ordinances must be considered together, and the meaning thereof ascertain-

ed simply by an inspection thereof, because 1. The Act of the Legislature does confirm *all* the ordinances; and, 2. The Act of Congress, only goes to the extent of confirming the same ordinances.

We close here, other than to present a synopsis of such of the cases referred to in appellant's brief as have been so presented therein as to be apparent authority in this cause upon contested points. We urge, with great respect, that these causes are not applicable to the case at bar.

Adams *vs.* Hill, 4 Shipley (Maine R., vol. 16), p 215, was where, IN A CONTRACT to pay for the erection of a church, reference was made to ANOTHER PAPER *for its terms*, and for the details of what plaintiff was to do. HELD: That the effect is the same as if the words of the paper referred to were inserted in the contract. There the other paper was made part of the written contract, and the two formed a whole, a unit, while here the *whole* went to the city for the the uses and purposes stated in the ordinances as above.

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Buckley *vs.* Blackwell, 10, O., 510, only decides that a call "up the creek," in a patent means, ordinarily, to run WITH THE CREEK. There is nothing in the opinion to the point made on p. 6 of appellant's brief.

Vance *vs.* Fore *et als.*, 24 Cal., 444, holds:

1.—That where one deed refers to another for a description of the granted premises, the deed referred to becomes a part of the first; and the description contained in it is regarded as of the same effect as if copied into the deed itself.

2.—*That where a map or plan of a tract of land, with lines drawn upon it marking its boundaries, and with the natural objects upon its surface laid down, is referred to in a deed as containing a description of the premises therein conveyed, this map or plan is to be regarded as giving the true description of the land conveyed, as much as if it was expressly recited and marked down in the deed itself.*

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Hicks *vs.* Colman *et al.*, 25 Cal. 128.

A deed from Shaddon to Hicks, introduced in evidence, conveyed "ALL MY RIGHT, TITLE, CLAIM, AND INTEREST IN THE PROPERTY DESCRIBED IN THE FOREGOING INSTRUMENT, WHICH IS MADE A PART HEREOF," and a deed from Heleno, Chief of the Mokelumne Indians, to Shaddon, being "THE

FOREGOING INSTRUMENT" referred to in the deed, the Court held that the Heleno deed must be read as a part of Shaddon's deed to Hicks, for the purposes of description merely — that is, merely to show WHAT was conveyed.

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Caldwell *vs.* CENTER (referred to in appellant's Brief as Caldwell *vs.* CARTER), 30 Cal. 541.

A deed, for description referred to a map in the County Recorder's Office, and the Court held that the deed not containing a sufficient description, it was the duty of the party offering the deed to produce also the map therein referred to for description.

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Miller *vs.* Nichols, 4 Wheaton, 311.

Chief Justice Marshall said, on error to the Supreme Court of Pennsylvania:

"It would have been sufficient to give this "Court jurisdiction of the cause, that the record "should show that an Act of Congress was appli- "cable to the case. That is not shown by this "record. The Act of Congress which is supposed "to have been disregarded, and which, probably, "was disregarded by the State Court, is that "which gives the United States priority in cases

"of insolvency. Had the fact of insolvency ap-
"peared upon the record, that would have enabled
"this Court to revise the judgment of the Su-
"preme Court of Pennsylvania. But that fact
"does not appear—no other question is presented,
"than the correctness of the decision of the
"State Court, according to the laws of Pennsy-
"vania, and that is a question over which this
"Court can take no jurisdiction."

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Gardner *vs.* Miller, 47 Cal. 570, 578, does NOT hold that a case may be re-examined in the Supreme Court of the United States, under the Judiciary Act, on the question of the Statute of Limitations of the State, AS AGAINST A UNITED STATES PATENT, issued on a Mexican Grant, as it involved the true construction of the treaty with Mexico; but the decision was, THAT THE STATUTE OF LIMITATIONS OF CALIFORNIA HAD NO APPLICATION TO THE TITLE OF A GRANTEE ANTERIOR TO THE ISSUANCE OF THE PATENT, and the State Court held that upon the question of title under the State Statute of Limitations, as against such unpatented grant, the United States Supreme Court had the power of re-examination; and this is as far as the opinion goes.

Turton *vs.* U. P. R. R. Co., 3, Dillon R. 366.

The action was commenced in a State Court of Nebraska, by a citizen of that State, to recover damages caused by the negligence of defendant in operating its road.

Answer in denial.

Petition of defendant for removal to U. S. Court, pursuant to Act July 1, 1862, stating, *int r alia*, therein, that it is not a banking corporation, and that it has a defense in and to said action, arising under said law of the United States. Cause removed. In the Circuit Court plaintiff filed a plea to the jurisdiction, which defendant denied. Plea submitted on agreed statement of facts, which admitted that no defense is claimed under any other law of the United States *than the charter of the defendant.* [12 Statutes at Large, 489.]

Plea to the jurisdiction overruled.

——— MILLER,
Circuit Justice.

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The removal of the cause was authorized by Section 640, Revised Statutes of the United States, which provides that any suit commenced in any court, other than a Circuit or District Court of the United States *vs.* any corporation

other than a banking corporation, organized under a law of the United States * * * FOR ANY ALLEGED LIABILITY OF SUCH CORPORATION * * * * * may be removed, FOR TRIAL, in the Circuit Court for the district where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the Constitution, or of any treaty OR LAW OF THE UNITED STATES.

The charter of the defendant consisted of a law of the United States, to-wit, the Act of July 1, 1862 [12 Stats. at L., 489]. The road authorized to be laid was to run through territories (not States) of the United States, and the Act of Congress constituting its charter was THE LAW alone pursuant to which the railroad company could sue or be sued.

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Orner *vs.* Saunders, 3 Dillon R. 284, was suit upon a bond given by a Deputy Collector of Internal Revenue, pursuant to an Act of Congress, and there being no doubt that the cause was one arising under the Constitution and laws of the United States, the Circuit Court held that it was properly removed from the State Court to the United States Circuit Court, as one arising under the laws of the United States. The Circuit Justice, cited Rev. Stats., Sec. 3148; Act of

March 3, 1875, Secs. 1, 23; Stat. of February 8, 1874, Sec. 12 (18 Stats. at Large, 309); Osborn *vs.* United States Bank, 9 Wheat, 739, and stated that "THIS LAST ACT GIVES THIS COURT ORIGINAL JURISDICTION OF SUCH ACTIONS, CONCURRENT WITH THE STATE COURTS."

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Osborne *vs.* United States Bank, 9 Wheat. 738, was a suit by the President, Directors and Company of the Bank of the United States, commenced in a Circuit Court. The Act of Congress constituting the charter of the bank authorized it to sue and be sued, etc. * * * * * in any Circuit Court of the United States, and the court so held [p. 817], and that under the Constitution Congress could give that power.

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In Chouteau *vs.* Eckhart, 2 Howard, 372 There was a contest as between a claimant of the title to lands under an old Spanish succession, confirmed by Congress in 1836, and the claimant under an Act of Congress passed on the thirteenth of June, 1812, confirming the titles and claims of certain towns and villages to village lots and commons. Each party claimed under an Act of Congress, and CONSTRUCTION was called, for on both Acts, in order to a just determination of the question, in whom is the true title?

In Pollard's Heirs *vs.* Kibbe, 14 Peters, 353 the plaintiffs claimed directly under an Act of Congress, and the defendant under a Spanish grant, which grant was recognized as a perfect grant, and so confirmed by Act of Congress. So each party, in fact, claimed under a separate Act of Congress.

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In "City of Mobile *vs.* Eslava," 16 Peters, 234, the city claimed under an Act of Congress of twenty-sixth May, 1824 [p. 242], and Eslava claimed the lands by purchase at a United States sale, pursuant to an Act of Congress of twentieth April, 1818 [p. 243].

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In "Berthold *et als. vs.* McDonald *et al*," 22, Howard 334, both parties claimed equitable titles only, and under a confirmation by the Board of United States Commissioners, sitting under the Act of Congress of March 3, 1807.

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In Railroads *vs.* Richmond, 15 Wallace, 3, the the record showed that the plaintiffs in error claimed in the State Court, that contracts made with the defendants in error had been rendered void and of no force and effect by provisions of the Constitution of the United States, and of

certain Acts of Congress, approved June 15, 1866, and July 25, 1866, and that the decision of the Supreme Court of Iowa denied this claim. The Court held this state of facts did make a case wherein an Act of Congress applied to the case, and that, therefore, the motion to dismiss must be denied.

Respectfully,

DELOS LAKE,
Attorney for Respondent.

W. C. BURNETT,
Counsel for Defendant in Circuit Court.

San Francisco, Saturday Nov. 11, 1876.

# Supreme Court of the United States.

No. 900. October Term, 1875.

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| "MICHAEL MCSTAY, PETER DONOHUE and JOHN KELSO, *Plaintiffs in Error*, *vs.* "JOSEPH H. FRIEDMAN. | In Error, to the Supreme Court of the State of California. |

"Mr. Chief-Justice Waite delivered the opinion of the Court.

"This was an action of ejectment, brought by "Friedman, to recover the possession of a certain "parcel of the Pueblo lands confirmed to the "city of San Francisco by the Act of Congress, "passed March 8, 1866. (14 Stat., 4) He did "not attempt to connect himself with the city "title, but relied entirely upon his alleged prior "possession and that of his grantors.

"The defendants, who are the plaintiffs in error, "set up in their answer as defenses: 1. Adverse "possession, with specifications, to bring them- "selves within the operation of the Statute of Lim- "itations; and 2. The title of the city of San Fran- "cisco, under the Act of Congress, and an as- "signment of that title to themselves, pursuant to "the provisions of the ordinance of the city and "an Act of the Legislature of California.

"At the trial no question was raised as to the "validity or operative effect of the Act of Con- "gress. The effort on the part of the plaintiffs "in error seems to have been: 1. To establish "their defense under the Statute of Limitations; "and, 2. To prove such possession as would, ac- "cording to their claim, transfer the city title to "them under the operation of the city ordinance "and the Act of the Legislature.

"A motion is now made to dismiss the writ "for want of jurisdiction.

"No federal question was involved in the decis- "ion of the Supreme Court. The city title was "not drawn in question. The real controversy "was as to the transfer of that title to the plain- "tiffs in error, and this did not depend upon the "'Constitution or any treaty or statute of, or "'commission held, or authority exercised under "'the United States.' The case is, therefore, "in all essential particulars, like that of Romie "*vs.* Casanova, decided at the present term, and "must be dismissed.